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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1247.

BOARD OF TRADE OF THE CITY OF CHICAGO,
Petitioner,

vs.

COMMODITY FUTURES TRADING COMMISSION,
Respondent.

MOTION OF THE CHICAGO MERCANTILE EXCHANGE FOR LEAVE TO FILE AS AMICUS CURIAE AND BRIEF OF CHICAGO MERCANTILE EXCHANGE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF THE CHICAGO MERCANTILE EXCHANGE FOR LEAVE TO FILE AS AMICUS CURIAE

The Chicago Mercantile Exchange respectfully moves, pursuant to Rule 42(3), for leave to file the attached brief amicus curiae in support of the Petition for a Writ of Certiorari heretofore filed by the Board of Trade of the City of Chicago. Movant was originally part of a group of commodity exchanges that intended to file a single amicus brief and as such was refused consent by the Solicitor General, because of the lateness of their request.

Leave is sought, because the Board of Trade's Petition does not deal with impact of the CFTC's challenged order on those commodity exchanges that were not the direct target of that order. If this motion is granted, the Chicago Mercantile Exchange believes it will be able to contribute substantially to this Court's understanding of the scope and breadth of the impact of such orders and to demonstrate the need to preserve a judicial safeguard against the CFTC's enlargement of its jurisdiction and powers.

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BRIEF OF CHICAGO MERCANTILE EXCHANGE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

A Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit was filed on February 12, 1980, by the Board of Trade of the City of Chicago ("Board of Trade"). It sought review and reversal of the decision in *Board of Trade of the City of Chicago* v. *Commodity Futures Trading Commission,* Appeal No. 79-1278, 605 F. 2d 1018 (7th Cir. September 12, 1979), in which the Court of Appeals held that the Commodity Futures Trading Commission's declaration that a market "emergency" exists is exempt from judicial review.

The Chicago Mercantile Exchange in accordance with the contemporaneous motion filed herewith seeks leave of Court to enter its appearance as amicus curiae to urge that the Petition of the Board of Trade be granted and to submit, at a later date, a brief on the merits urging rejection of certain erroneous legal principles fashioned by the Court of Appeals in reaching its decision.

The Chicago Mercantile Exchange urges that the Petition of the Board of Trade be granted, because the Court of Appeals decided an important question of federal law which has yet to be resolved by this Court—whether the Commodity Futures Trading Commission's decisions of law and arbitrary and capricious factual determinations are subject to judicial review.

NATURE AND INTERESTS OF THE CHICAGO MERCANTILE EXCHANGE

The Chicago Mercantile Exchange ("CME") is the world's second largest commodities futures market. It conducts futures trading in agricultural products, metals, currencies, and debt instruments. In 1979, trading volume was 20 million contracts valued at many billions of dollars.

The emergency action of the CFTC which is the subject of the Petition for a Writ of Certiorari was not directed at trading on the Chicago Mercantile Exchange, however, it had consequences for all exchanges. It directly affected those traders who had intermarket spreads or hedges. For example, certain cattle feeders, regularly take related positions in grains and in either live cattle or feeder cattle in order to protect against unexpected fluctuations in the relationship of the costs of feeding cattle and the ultimate value of the fed cattle. That portion of the transaction relating to cattle would have been done on our exchange while the portion relating to grain would have been done on the Board of Trade. The hedger is put in an impossible situation when one-half of his transaction continues to fluctuate

in accordance with market forces, whereas the other portion is fixed at a price level determined by the CFTC.

The interest of the CME is not limited to the particular instance decided by the Court of Appeals. Since that date, the Commodities Futures Trading Commission again invoked § 8a(a) as authority to halt futures trading in circumstances which do not constitute a market "emergency" as that term is expressly defined by Congress.

The CFTC's misuse of its "emergency" power without the check of an effective appeal injures futures markets and traders. Those individuals who use futures markets in order to reduce their business risks must be assured that arbitrary and capricious actions of the CFTC do not interfere with the regular functioning of futures markets. The Court of Appeals' decision improperly unbridles the CFTC thereby undermining confidence in the functioning of futures markets.

THE ISSUES FOR REVIEW

1. Is the CFTC's interpretation of the boundaries of "emergency" as defined at section 8a(9) of the Commodity Exchange Act [7 U. S. C. § 12a(9)] immune from judicial review?
2. May the CFTC arbitrarily and capriciously declare an "emergency" and frame orders in response thereto?

ARGUMENT

The Court of Appeals' decision is completely at odds with the standards of judicial review applicable to other federal agencies. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402 (1971). The Supreme Court has not specifically passed on the scope of judicial review of CFTC "emergency" declarations and actions and it is imperative that it act promptly to overrule the decision of the Court of Appeals for the Seventh Circuit—which is the focal point of commodity trading.

The Commission was granted "emergency" powers by the Commodity Futures Trading Commission Act of 1974, which added section 8a(9) to the Commodity Exchange Act. That section imposes three distinct prerequisites to the exercise of "emergency" powers. The first is that the circumstance to which the Commission is responding is an "emergency" as defined by the section. For example, "emergency" is defined to include "any act of the United States . . . affecting a commodity . . . which prevents the market from accurately reflecting the forces of supply and demand for such commodity . . . ." A price freeze is a clear example of this category of "emergency" since the forces of supply and demand are precluded from operating.

After the Court of Appeals' declaration of immunity from review, which is the subject of this Petition, the CFTC broadly interpreted a section 8a(9) "emergency" to include any act of the United States which might cause confusion among traders regarding supply and demand factors. President Carter's announced grain embargo of Russia was declared an "emergency" although the President's action merely shifted the supply/demand curves. The embargo did not prevent the market from accurately reflecting trader's estimates of the forces of supply and demand. The Court of Appeals' refusal to review the initial unlawful expansion by the CFTC of its emergency authority encouraged this subsequent additional enlargement.

The second prerequisite to the exercise of "emergency" power is that the Commission "have reason to believe that an emergency exists." For example, while the Commission has power to act in the event of a threatened market manipulation, the question remains whether on the facts then available to the Commission, it has "reason to believe" that a market manipulation is threatened. The decision of the Court of Appeals insulates from review the Commission's factual determination in that the Court of Appeals sanctioned the Commission's refusal to come forward with any basis for its judgment that an emergency existed.

This case came before the Court of Appeals on a hearing record where "clear and convincing" evidence had been submitted by the Board of Trade which convinced the District Court that it was arbitrary and capricious for the Commission to have declared the existence of an "emergency" within the meaning of section 8a(9). The Commission had refused to provide any rebuttal to the charge that it had acted arbitrarily, capriciously and in contravention of the statute. Instead it asserted that its order was "not judicially reviewable." (605 F. 2d at 1019).

On appeal, the Commission backed away from its unqualified assertion of immunity and conceded:

> [T]hat agency action committed to agency discretion is nevertheless judicially reviewable where such action is challenged on constitutional grounds, or upon a claim that the agency has acted in bad faith or in a manner plainly repugnant to its statutory authority. (605 F. 2d at 1021, n. 6)

The Court of Appeals refused the concession and held that mere recitation by the Commission that its action was in accord with section 8a(9) shielded the action from judicial review:

> [T]he merits of the Commission's emergency determination are precluded from judicial review . . . (605 F. 2d at 1025)

The Court of Appeals discarded the findings of the District Court, based on evidence, and gave sole credence to the Commission's conclusory recitations in its order of March 15, 1979. (605 F. 2d at 1018-1019)

The third prerequisite to an "emergency" action is that the contemplated curative order be "necessary to maintain or restore orderly trading in, or liquidation of, any futures contract." The section clearly affords the Commission wide latitude in its choice of remedy, but it does require the Commission to exercise "judgment." The Court of Appeals has insulated the Commission's exercise of judgment from any subsequent review by

prohibiting inquiry into whether the order resulted from an exercise of judgment or was merely an arbitrary and capricious act motivated, for example, by self interest, political considerations, or matters unrelated to the objectives of the Act.

CONCLUSION

The decision of the Court of Appeals has been taken by the CFTC as a license to regulate beyond congressionally imposed limits in the guise of responding to "emergencies." The uncontrolled expansion of the CFTC's jurisdiction is clearly contrary to consistently expressed congressional concern regarding this agency and contrary to the self-regulatory concept which permeates the Act. We urge that the Board of Trade's Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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